Supreme Court, U.S.
FILED
JAN 11 2001
OFFICE OF THE CLERK

Nos. 00-629 & 00-652

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

v.

KINGDOM OF SPAIN

SEA HUNT, INCORPORATED

v.

KINGDOM OF SPAIN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

JAMES A. GOOLD
Counsel of Record
Robert A. Long, Jr.
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Respondent

January 2001

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BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

The decision of the court of appeals rests on multiple, independent and settled principles of domestic and international law governing sovereign vessels and military gravesites. The court of appeals correctly applied these principles to affirm the Kingdom of Spain's ownership of its Royal Navy Frigates *La Galga* and *Juno* and its right to protect from commercial exploitation the final resting place of more than 425 Spanish soldiers, sailors and their dependents who died at sea in the service of their country.

To create the appearance of a conflict among the courts of appeals, Petitioner Commonwealth of Virginia ("Virginia") conflates cases applying a principle of implied abandonment where the owner of a vessel did *not* appear to protect its interests with cases in which the owner *did* appear – as the Kingdom of Spain did in this case – and proof of express abandonment was required. Virginia's Petition also ignores controlling treaties, case law and principles of international policy on which the court of appeals grounded its decision.

The court of appeals correctly held that the Royal Navy Frigates *La Galga* and *Juno* are the property of the Kingdom of Spain under at least five parallel lines of legal authority: the 1902 Treaty of Peace and General Relations Between Spain and the United States; the deference United States courts accord to understandings between other nations concerning the meaning and effect of treaties between those nations; the deference United States courts accord to military and foreign policy decisions of the Executive Branch; international law and custom concerning sovereign vessels and military gravesites; and the proper application of the Abandoned Shipwreck Act where a sovereign owner contests claimed abandonment of its vessels. No conflict among the

courts of appeals is presented by the court of appeals' application of these principles.

Petitioner Sea Hunt, Incorporated ("Sea Hunt") misreads *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), as somehow precluding a sovereign from appearing in an *in rem* proceeding to defend its ownership of a sovereign vessel. In this case, the Kingdom of Spain appeared before a U.S. court and submitted proof of ownership that was found to be dispositive. Accordingly, *Deep Sea Research* has no bearing on this case. Sea Hunt also misconstrues the admiralty law of salvage. In accordance with long-settled principles, the court of appeals correctly held that Spain was entitled to protect its vessels from commercial exploitation.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 221 F.3d 634.[1] Opinions of the district court are reported at 47 F. Supp. 2d 678 (Pet. App. 28-59) and 22 F. Supp. 2d 521. The district court's decision denying Sea Hunt's request for a salvage award is unreported. *See* App., *infra*, 1a-9a.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2000. Pet. App. 2. The petitions for a writ of certiorari were filed on October 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] References to "Pet. App." are to the appendix to the Commonwealth of Virginia's Petition, No. 00-629.

COUNTERSTATEMENT OF THE CASE

1. The Royal Navy Frigates *La Galga* and *Juno* are commissioned warships of Respondent the Kingdom of Spain. The frigates sank in 1750 and 1802, respectively. At the time of their sinkings, each vessel was engaged in military service. Each vessel remains to this day on the rolls of the Navy of Spain. Under Spanish law, each vessel is public dominion property of the Kingdom of Spain. (C.A. App. 235, 229-30, 238-39).

a. *La Galga* was a fifty-gun frigate commissioned into the Spanish Navy in 1732. On her final voyage, *La Galga* was serving as escort to a convoy of merchant ships bound from Havana to Spain, providing protection from pirates. On board *La Galga* were the Second Company of the Sixth Battalion of Spanish Marines, royal property and military prisoners. On August 18, 1750, the convoy encountered a hurricane that scattered the ships and drove them westward towards Colonial America. Over the next week, *La Galga* lost her masts and rudder. On August 26, 1750, *La Galga* struck a shoal off Assateague Island, near the border between Virginia and Maryland, and sank. (C.A. App. 218-19; 423-24).

Most of those on board *La Galga* reached land and the wreck remained accessible for a month or more. From late August into October 1750, Captain Daniel Huoni unsuccessfully sought the assistance of the Virginia authorities to protect the wreck and to prevent looting. On November 3, 1750, Governor Ogle of Maryland pledged to send sheriffs to stop the looting, but a second storm scattered the wreck and ended all salvage efforts. The remains of *La Galga* were driven by storms and wave action into the seabed and became unrecoverable by then-existing salvage technology. (C.A. App. 147-53; 424-25; 429).

b. *Juno* was a thirty-four gun frigate built for the Royal Navy of Spain in 1789, at the outbreak of the Napoleonic Wars. *Juno* was assigned to Spain's Caribbean Fleet and spent the remainder of her military service on convoy escort duty. *Juno*'s final voyage began as escort to a convoy from Vera Cruz to Cadiz, but she suffered storm damage en route and put in to Puerto Rico for repairs, while the other ships continued on to Spain. After repairs were completed, *Juno* was assigned in October 1802 to serve as a troopship taking the soldiers of the Third Battalion of the Regiment of Africa and their families home to Spain from combat duty. East of Norfolk, Virginia, *Juno* encountered a fierce storm and disappeared at sea with more than 425 soldiers, sailors and military dependents on board. Over the next year, Spain's Consul General in Boston unsuccessfully canvassed United States ports for any reports of *Juno* survivors or sightings of wreckage. (C.A. App. 216-17).

2. Petitioner Sea Hunt is a commercial salvage firm that secured a permit from Virginia to take artifacts from *Juno* and *La Galga*, in return for granting Virginia a share of the proceeds. Through historical research, Sea Hunt was aware that both ships were Spanish Royal Navy vessels believed to have sunk in the vicinity of Assateague Island, Virginia. (C.A. App. 417-22; 423-30). On learning of Sea Hunt's proposed activities, the Kingdom of Spain advised that it objected to disturbance of *La Galga* and *Juno* and expressed its desire that their remains be left undisturbed as military gravesites. (C.A. App. 103, 104). Sea Hunt initiated this *in rem* action because it anticipated that Spain would claim ownership of *La Galga* and *Juno* and object to salvage. (C.A. App. 66, 73, 80, 82).

In March 1998, Sea Hunt initiated an *in rem* admiralty action seeking a declaratory judgment that *Juno* and *La Galga* had been abandoned and ceased to be sovereign vessels of Spain, and that they had become the property of Virginia or Sea Hunt under the Abandoned

Shipwreck Act or the law of finds. Pet. App. 33. In the alternative, Sea Hunt sought a salvage award giving it exclusive rights as salvor-in-possession to the vessels and their contents.

After filing its *in rem* claim, Sea Hunt conducted limited salvage operations. At a September 15, 1998 hearing concerning those operations, unrebutted expert testimony was presented by a National Park Service underwater archaeologist that Sea Hunt was using inappropriate and potentially destructive techniques to scour the seabed for artifacts that were endangering the remains of the vessels. (C.A. App. 181-97). At the request of the district court, Sea Hunt agreed to cease operations until ownership of *Juno* and *La Galga* had been adjudicated.

3. In response to the Sea Hunt and Virginia claims, Spain appeared in the district court and filed a verified claim that it is the owner of *Juno* and *La Galga*. In support of a motion for summary judgment and in opposition to a Sea Hunt and Virginia cross-motion, Spain provided the district court with documentary history of the vessels demonstrating that both had been commissioned naval vessels on active duty and had never been abandoned or stricken from the rolls of the Spanish Navy. Spain also demonstrated that under Spanish law *Juno* and *La Galga* are public dominion property of Spain that can only be ceded or abandoned by an express act authorized by Parliament. Spain also objected to commercial exploitation of the gravesites of its personnel. (C.A. App. 104; 105-26; 198-204; 214-34; 235, 238).

4. Central to this case and to the decision of the court of appeals are two treaties entered into by the Kingdom of Spain. Article X of the 1902 Treaty of Friendship and General Relations (33 Stat. 2105, 2110-11, 11 Bevans 628, 632) obligates each nation "in cases of shipwreck" to provide the vessels of the other nation with "the same assistance and

protection and the same immunities which would have been granted to its own vessels in similar cases." The understanding of the United States and Spain, affirmed by the court of appeals, is that this article obligates the United States to provide a Spanish sovereign vessel shipwrecked in United States waters with the same rights and immunities that the United States provides to its own sovereign vessels.

The earlier treaty is the 1763 Definitive Treaty of Peace, 42 Consol. T.S. 279 (Feb. 10, 1763) (C.A. App. 521-34) by which Spain, Great Britain, France and Portugal ended the Seven Years' War. To resolve the conflict between Spain and Great Britain, Great Britain agreed to withdraw its forces from Cuba (Article XIX) in exchange for the cession by Spain of claims to territory east of the Mississippi River "on the continent of North America." (Article XX). The 1763 Treaty expressly preserved Spain's ownership of moveable Royal Property in North America, providing that "[H]is Catholick Majesty shall have the power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." (Article XX). In the district court, Diplomatic Notes of Great Britain and Spain documented each nation's common understanding that the Treaty was not a cession of *La Galga* from Spain to Great Britain. App., *infra*, 27a, 29a.

5. In support of Spain's ownership rights in *Juno* and *La Galga* and its right to refuse salvage, the United States submitted Statements of Interest on behalf of the Departments of State and Defense. The Department of Defense statement declares the policy of the United States that more than 16,000 sunken U.S. military vessels and aircraft sunk around the world, including uncounted military gravesites, remain United States property absent an authorized express declaration of abandonment. App., *infra*, 21a-22a. It also articulates the United States' policy to secure protection for its sunken sovereign vessels and aircraft from unauthorized disturbance by providing reciprocal

treatment to other nations: "The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign non-commercial United States wrecks in foreign waters to be treated." App., *infra*, 24a.

The Declaration of Interest of the Department of State states that Article X of the 1902 Treaty of Friendship and General Relations is "unique" among the many United States treaties of friendship, commerce and navigation with other nations and, in the view of the Department of State, "imposes on the United States the responsibility to afford to these . . . vessels [*La Galga* and *Juno*] the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location." App., *infra*, 13a, 14a.

6. The district court upheld Spain's ownership of *Juno* and its right to reject salvage, but ruled that *La Galga* had been expressly abandoned by Spain under the district court's interpretation of the 1763 Definitive Treaty of Peace. Accordingly, the district court ruled that *La Galga* had become the property of Virginia under the Abandoned Shipwreck Act. Pet. App. 50-53.

7. The court of appeals affirmed the district court's rulings upholding Spain's ownership of *Juno* and denying Sea Hunt salvage rights. The court of appeals reversed the district court's ruling that the 1763 Treaty abandoned *La Galga*. The court of appeals held that Petitioners had been required to show express abandonment under long-settled admiralty law principles reflected in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), Pet. App. 11, and under the Abandoned Shipwreck Act's definition of "abandoned shipwrecks" as those "to which the owner has relinquished ownership rights *with no retention*." (43 U.S.C. § 2101(b))

(emphasis added). The court of appeals further held that, while an implied abandonment standard may be applied to privately owned vessels, an express abandonment standard is required "where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks." Pet. App. 10-11. Express abandonment is also required under Article X of the 1902 Treaty, which confers on Spanish vessels "the same immunities" conferred upon similarly situated vessels of the United States. The immunities extended to Spain's vessels by the 1902 Treaty include the preclusion of implied abandonment of United States property under the Property Clause of the Constitution (U.S. Const. art. IV § 3). Additionally, the court of appeals held that application of an express abandonment standard to *La Galga* and *Juno* is required by the legitimate interests of the executive branch in respecting "the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Pet. App. 16 (quoting Statement of Interest, U.S. Dept. of State ¶ 15 (App., *infra*, 14a)).

Applying these principles, the court of appeals ruled that no express abandonment of *La Galga* had been shown. As to the Treaty of 1763, the court agreed with Spain and Great Britain that the cession in the Treaty of territory "on the continent of North America" "was not intended to include movable property located in coastal waters," an understanding which is consistent with this Court's rulings in the Submerged Lands cases that 18th Century North America territory did not include coastal waters. Pet. App. 24. Moreover, the court recognized that the closing proviso of Article XX of the Treaty includes an express reservation of Spain's rights to its movable property in North America. Pet. App. 22.

Finally, the court of appeals observed that, if implied abandonment were the applicable standard, "even a finding of implied abandonment would be improper" in this case. Pet. App. 25.

REASONS FOR DENYING THE WRIT

1. This Case Is Not An Appropriate Vehicle For Determining The Meaning Of "Abandonment" Under Admiralty Law.

Virginia urges the Court to grant review in this case to determine the meaning of "abandonment" under the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (1988) (codified at 43 U.S.C. § 2101-2106 (1994)), and general admiralty law. *See* Pet. 8-25. In particular, Virginia urges the Court to grant review in order to decide whether abandonment may be implied from inaction over a period of time, or instead requires an express act by the owner of the sunken vessel. Pet. 10-15.

There are multiple reasons why this case is not an appropriate vehicle for deciding that issue. *First*, this case involves sunken warships of a sovereign nation, which may be abandoned only by express act of the sovereign even if privately-owned shipwrecks are subject to an implied abandonment standard. *Second*, the 1902 Treaty between the United States and Spain requires the application of an express abandonment standard in this case. And *third*, the choice of a legal standard does not ultimately matter in this case, because the vessels at issue were not abandoned even under an implied abandonment standard.

a. This Case Involves Sovereign Vessels.

The *Juno* and *La Galga* were frigates in the Spanish Navy. Indeed, both ships remain on the Spanish Naval Registry to this day. Even if sunken private vessels may be subject to a standard of implied abandonment, there are strong arguments that vessels owned by a sovereign nation – and, especially, warships of a sovereign nation – should

remain property of the sovereign absent an express act of abandonment.[2]

The United States Government takes the position that warships of a sovereign nation remain the property of the sovereign absent an express act of abandonment. The United States, in addition to appearing as an *amicus curiae* in support of Spain, has submitted formal statements of the foreign and military policy of the United States. App., *infra*, 10a, 20a. The Statement by the Department of Defense, signed by the Judge Advocate General of the Navy, sets forth the interest of the United States in honoring the principle that a nation's sunken naval vessels are sovereign property that may not be disturbed without express authorization from the sovereign. App., *infra*, 23a. The declaration observes that more than 1,500 sunken U.S. naval vessels and countless sunken aircraft are located around the world, and that it is important that "the United States and its constituent States [grant] reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters." *Id.* The State Department submission, signed by the Deputy Assistant Secretary of State for Oceans, Fisheries and Space, declares that it is "the policy of the United States Department of State to recognize claims by foreign governments . . . to ownership of foreign

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[2] The legislative history of the Abandoned Shipwreck Act indicates that sovereign vessels are treated differently from other vessels. *See* Pet. App. 10 (quoting H.R. Rep. No. 100-514(II), at 13 (1988)) ("[T]he U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. . . . The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State."). *See also* Brief of the United States, at 35 & n.25, *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (No. 96-1400).

warships sunk in waters of the United States." App., *infra*, 12a. The statement further declares that "[i]t is in the foreign policy interest of the United States to honor the request of the Government of Spain" in this case that its sunken warships not be disturbed. *Id.* at 14a. Because this case involves a special kind of shipwreck – warships of a sovereign nation – there is no occasion for the Court to consider whether shipwrecks of all kinds are subject to a rule of implied abandonment.

b. An Express Abandonment Standard Is Required Under The 1902 Treaty Between the United States and Spain.

The court of appeals held that "express abandonment . . . is required [under the terms] of the 1902 Treaty of Friendship and General Relations between the United States and Spain." Pet. App. 13. The 1902 Treaty provides that "[i]n cases of shipwreck, . . . each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." 33 Stat. 2105, 2110-11, 11 Bevans 628, 632. The U.S. Department of State informed the courts below "'that this provision is unique' in that no other 'friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships.'" Pet. App. 13-14 (quoting U.S. Department of State, Statement of Interest ¶ 13 (App., *infra*, 13a)).

Both the United States and Spain agree that the Treaty provides that Spanish ships sunk in U.S. territorial waters are accorded the same immunity as U.S. ships sunk in U.S. waters. As the court of appeals noted, U.S. vessels "may only be abandoned by an express, unambiguous, and affirmative act." Pet. App. 14 (citing U.S. Const. art. IV § 3; *United States v. California*, 332 U.S. 19, 39-40 (1947); *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992)). The court of appeals appropriately concluded: "We

cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities." Pet. App. 15.

The court of appeals' interpretation of the 1902 Treaty is plainly correct. In any event, the lower court's resolution of this narrow issue, on which there is no circuit conflict, warrants no further review.

c. Spain Would Retain Ownership Of The Vessels At Issue In This Case Even Under An Implied Abandonment Standard.

The court of appeals concluded that "even a finding of implied abandonment would be improper" in the circumstances of this case. Pet. App. 25. As the court of appeals noted, the Kingdom of Spain strove to protect *La Galga* after she sank, maintained the ship on its Naval Registry, and "vigorously asserted" a claim of ownership when Sea Hunt commenced its *in rem* admiralty action. *Id.* The court of appeals also noted that the technology needed to find and recover the wreck only recently became available. *Id.*

The court of appeals' resolution of this fact-bound issue is correct and warrants no further review. Because the result in this case ultimately does not depend on whether the court applies a standard of express abandonment or implied abandonment, there is no reason for this Court to address that issue in this case.

* * *

In sum, before reaching the question whether sunken vessels may be abandoned by implication, the Court would have to (1) overturn the court of appeals' fact-bound determination that there has been no abandonment of the

vessels at issue in this case under an implied abandonment standard; (2) overturn the court of appeals' interpretation of the 1902 Treaty between the United States and Spain (a narrow issue on which the parties to the treaty are in agreement) and (3) consider whether warships of a sovereign nation are subject to an express abandonment standard even if privately-owned shipwrecks are subject to a less-demanding implied abandonment standard. Not one of these issues merits review. And there is no reason to think that this Court would disagree with the court of appeals' well-reasoned resolution of any of these issues, let alone all of them.

2. The Court of Appeals' Decision Does Not Create A Circuit Conflict.

Virginia asserts (Pet. 10-15) that the courts of appeals are in conflict over the question whether abandonment of shipwrecks may be implied rather than express. The court of appeals' decision in this case does not conflict with any decision of another court of appeals. Moreover, any disagreement among the circuits is less sharply defined, and less significant, than is suggested by Virginia's Petition.

As the court of appeals explained, the Fourth Circuit has not ruled out implied abandonment of a shipwreck in all circumstances. The Fourth Circuit has held that "a court *may* infer an abandonment" when the property is "an ancient and long-lost shipwreck." *Columbus-America*, 974 F.2d at 464-65 (emphasis added). The Fourth Circuit has declined to draw an inference of abandonment, however, when the owner appears in the *in rem* action and asserts a claim of ownership. *Id.* In reaching this conclusion, the Fourth Circuit has relied on the established rule that when an owner asserts a claim to property that was involuntarily taken from his control, "the law is hesitant to find an abandonment." Pet. App. 12 (quoting *Columbus-America*, 974 F.2d at 467-68).

As the Fourth Circuit observed, no other court of appeals has employed an implied abandonment standard against an owner that has appeared in an *in rem* action and asserted a claim to its property. Pet. App. 12. For that reason, the decision in this case does not conflict with any decision of any other court of appeals.[3]

In addition, as noted above, this case involves warships of a sovereign nation rather than privately-owned vessels. Because sovereign vessels are subject to an express abandonment standard even if privately-owned vessels may be subject to an implied abandonment standard, decisions holding that private vessels have been impliedly abandoned do not conflict with decisions, such as this one, applying an express abandonment standard to a sovereign warship.

Even as to privately-owned vessels, the Fourth Circuit's decision in *Columbus-America* does not represent a sharp departure from prior admiralty law or the decisions of other circuits. The Sixth Circuit has observed that "the apparent divergence of authority" between its decisions and those of the Fourth Circuit "masks a degree of underlying agreement." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 177 F.3d 491, 499 (6th Cir. 1999). The Sixth Circuit's standard, like the Fourth Circuit's, "reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will"

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[3] Petitioners and their amici repeatedly cite decisions in which the owner of the vessel did not come forward to contest the claim of abandonment. *See* Sea Hunt Pet. 16-17; Virginia Pet. 17; Professional Shipwreck Explorers Ass'n Amici at 13-14. In those cases, the courts may infer abandonment from the owner's failure to appear and therefore need not address whether express abandonment has been shown. These decisions have no bearing on whether express or implied abandonment is appropriate when, as here, the owner has appeared.

and requires parties alleging abandonment to meet "the exacting burden of proof admiralty law imposes on those who allege abandonment." *Id.* at 499-500. Similarly, the First, Fifth, and Ninth Circuits have inferred abandonment only in cases in which the original owner failed to appear and assert a claim of ownership. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (original owner does not lose title "except in extraordinary cases"); *see also Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir.) (upholding original owner's claim to cargo), *cert. denied*, 121 S. Ct. 62 (2000) (No. 99-1958).[4]

In sum, this case differs from other decisions of courts of appeals in that the Kingdom of Spain, a sovereign nation, appeared in the admiralty court and asserted a claim to its sovereign vessels. No court of appeals' decision has applied a standard of implied abandonment in similar circumstances, and therefore the Fourth Circuit's decision in this case does not create a circuit conflict.

3. The Additional Issues Raised in Sea Hunt's Petition Merit No Further Review.

Sea Hunt raises two additional issues that plainly do not warrant this Court's attention. *First*, Sea Hunt asserts

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[4] The petition for a writ of certiorari in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), urged the Court to grant review to resolve an asserted circuit conflict over whether abandonment may be implied as well as express. This Court recently denied the petition. 121 S. Ct. 277 (2000) (No. 99-1935).

(Sea Hunt Pet. 9) that "the Fourth Circuit is providing Spain a sovereign immunity and/or exemption from a direct proceeding *In Rem* against all vessels originally owned by Spain," contrary to this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). Sea Hunt simply misreads this Court's decision in *Deep Sea Research*. That decision holds that a State's immunity from suit under the Eleventh Amendment does not extend to an *in rem* proceeding, at least if the *res* is not in the actual possession of the State. Assuming that the holding in *Deep Sea Research* applies with full force to a sovereign nation, the court of appeals' decision in this case is entirely consistent with *Deep Sea Research*. Spain did not contend that the district court lacked authority to determine ownership of the shipwrecks. Instead, Spain appeared before the court and submitted a claim to the *res*. The courts below considered Spain's proofs of ownership, evaluated Petitioners' counter-evidence, and ruled in favor of Spain on the merits. That is a very different matter from holding that the sovereign immunity of the Kingdom of Spain extends to *in rem* proceedings, or that Spain is "exempt" from *in rem* proceedings in admiralty. Sea Hunt's effort to manufacture a conflict with this Court's decision in *Deep Sea Research* is baseless.

Second, Sea Hunt's petition includes a lengthy and confused discussion of the law of salvage. *See* Sea Hunt Pet. 19-25. The court of appeals rejected Sea Hunt's claim to a salvage award in a footnote at the end of its opinion. Pet. App. 27 n.2. The court of appeals agreed with the district court that "[i]t is the right of the owner of any vessel to refuse unwanted salvage," and that "Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership interests and refusal to agree to

salvage activity." *Id.*[5] The lower court's resolution of Sea Hunt's salvage claim is fact-bound, does not conflict with any decision of another court of appeals, and reflects the long-settled doctrine that the owner of a vessel, including a long-sunken vessel, has the right to reject a salvor's services. *See, e.g., Lathrop v. Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993); *Bonifay v. The Steamship Paraporti*, 145 F. Supp. 879, 882 (E.D. Va. 1956); *The Pohatcong*, 77 F. 996, 997 (S.D.N.Y. 1896); *New Harbor Protection Co. v. Steamer Charles P. Chouteau*, 5 F. 463, 464 (D. La. 1881); *The Yucatan*, 30 F. Cas. 893, 895-96 (S.D. Fla. 1847); *cf. Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985). No further review is warranted.

4. The Foreign Policy Implications Of This Case Counsel Against Further Judicial Proceedings.

"Our Constitution charges the political branches with the conduct of foreign affairs." Pet. App. 16 (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948)). This case involves relations between the United States and the Kingdom of Spain, the interpretation of a treaty signed by both sovereigns, the shared understanding of Spain and Great Britain as to the terms of their 1763 Peace Treaty, and principles of international comity. The court of appeals recognized that "[t]he United States 'is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration,

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[5] Amici Professional Shipwreck Explorers Ass'n *et al.* argue that a "non-possessing sovereign" cannot refuse salvage (Br. 5-6). The lower courts, however, correctly rejected this distinction as unsupported by precedent. *See* Pet. App. 27 n.2; App., *infra*, 3a.

or exploitation, by private parties seeking treasures of the sea.'" Pet. App. 25-26 (quoting Brief of the United States as Amicus Curiae, at 1). As the court of appeals recognized, "matters as sensitive as these implicate important interests of the executive branch." Pet. App. 26.

The court of appeals noted that "[t]he express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels," and concluded that "[i]t is simply not for [the courts] to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law." Pet. App. 16. *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (It is "not for the courts to deny an immunity which our government has seen fit to allow."). In interpreting the relevant treaty provisions, moreover, the Fourth Circuit followed the principle that "'[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.'" Pet. App. 15 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The Fourth Circuit concluded its opinion by reiterating that appropriate deference to the executive branch prevents a court from "just turn[ing] over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner." Pet. App. 26.

The same considerations of deference to the executive branch weigh against further judicial proceedings in this case. As the court of appeals recognized, the Kingdom of Spain "vigorously asserted its ownership rights in this proceeding," and "[n]othing in the law of admiralty suggests

that Spain has abandoned its dead by respecting their final resting place at sea." *Id.*[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

James A. Goold
Counsel of Record
Robert A. Long, Jr.
Keith A. Noreika
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Respondent

January 2001

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[6] The United States filed briefs as *amicus curiae* in support of the Kingdom of Spain in both the district court and the court of appeals. The Kingdom of Spain recognizes that the usual practice of the United States is not to file an amicus brief at the petition stage without an invitation from the Court. In view of the foreign policy and military implications of this case, the Kingdom of Spain respectfully requests that if the Court were inclined to grant the petitions, it invite the Solicitor General to file a brief expressing the views of the United States before granting review.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, etc. *in rem, et al.*,

Defendants.

Case No. 2:98cv281

June 25, 1999

OPINION AND ORDER

Before CLARKE, District Judge.

This case is currently before the Court on the issue of Plaintiff Sea Hunt, Inc.'s ("Sea Hunt") entitlement to a salvage award for locating and salvaging articles from the JUNO, a Spanish frigate which sank off the coast of Virginia in 1802.

By Order of April 27, 1999, this Court held that the Kingdom of Spain ("Spain") had never abandoned the wreck of the JUNO and retained ownership of the remains of the vessel. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 1999 WL 257748

(E.D. Va. 1999).[1] By the same Order, this Court directed the parties to the case to submit briefs on the issue of whether Sea Hunt should receive a salvage award for services conducted on JUNO even though Spain retained ownership of the wreck. Pursuant to this Court's Order of June 7, 1999, the Court allowed the parties to file reply briefs on the same issue. All briefs having now been received and considered, the Court FINDS that because Spain communicated to Sea Hunt its desire that the wreck of JUNO should not be disturbed, Sea Hunt is not entitled to any award for services performed in contradiction to Spain's wishes.[2]

Although the "law of salvage presumes that the owner desires the salvage service," *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999), "potential salvors do not have an inherent right to save distressed vessels." *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993). A salvage award "may be denied if the salvor forces its services on a vessel despite the rejection of them by a person with authority over the vessel." *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983). The doctrine of rejection of salvage is an ancient one, and has been recognized by many courts. *See, e.g.*, *The YUCATAN*, 30 F. Cas. 893 (S.D. Fla. 1847); *The CHOTEAU*, 4 Woods 71, 9 F. 211 (C.C.E.D. La. 1881); *The POHATCONG* , 77 F. 996 (S.D.N.Y. 1896); *The INDIAN*, 159 F. 20 (C.C.A.5 1908); *Legnos v. M/V OLGA*

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[1] This Court also held that LA GALGA, a Spanish frigate which sank in 1750, had been explicitly abandoned by Spain.

[2] The parties raised a number of issues in their briefs, including whether Spain is entitled to sovereign immunity, and whether the wreck of JUNO should receive special treatment as a war grave. However, as the Court previously declined to address the nature of JUNO as a military vessel, and because common law principles are sufficient for decision on this matter, these issues will not be discussed.

JACOB, 498 F.2d 666 (5th Cir. 1974); *Consolidated Towing Co. v. Hannah*, 509 F. Supp. 1031 (W.D. Mo. 1981). This doctrine has also been previously recognized by this Court. *See Bonifay v. The PARAPORTI*, 145 F. Supp. 879 (E.D. Va. 1956) (parties attempting to salvage vessel contrary to owner's instructions were "gratuitous intermeddlers" and were entitled to no award). While a party may salvage a vessel without the express permission of the vessel's master or owner, *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613, 71 L. Ed. 1232, 47 S. Ct. 663 (1927) (absent express consent, salvage award may be granted when "under the circumstances, any prudent man would have accepted" the services), an unequivocal rejection of salvage services will normally be respected. *New Harbor Protection Co. v. The CHARLES P. CHOUTEAU*, 5 F. 463, 464 (D. La. 1881) ("If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so.").

Sea Hunt has argued in its briefs that a rejection of salvage services may only be accomplished when the owner or master is in actual possession of the vessel and in a position to rescue the property. While it is true that in most cases of rejection of salvage, the owner or master is in possession of the vessel, the Court finds that possession of the vessel in these cases is merely a circumstance of the rejection, and not a requirement. The Court has found no statement of law which requires that the master of a vessel be present to effectuate a rejection of salvage. In fact, the right to reject salvage has been recognized in cases involving long-lost shipwrecked vessels. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) (salvage award denied where the owner of the vessel "may not even have desired for the property to be rescued."); *see also Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817

F. Supp. 953, 964 (M.D. Fla. 1993); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988).

In *Platoro* and *Lathrop*, the courts adopted the idea of "constructive rejection" of salvage. Constructive rejection "bars an award if the rejection was reasonably understood by a salvor." *Lathrop*, 817 F. Supp. at 964. In *Lathrop*, the wrecked vessel subject to salvage was located in submerged land belonging to the State of Florida and dedicated to the United States for use as a national park. The *Lathrop* court determined that the salvor was not entitled to an award because, based on the wreck's location within a national park, the salvor "should have known that the State of Florida, the presumed owner of the submerged lands and any property embedded in the soil, might refuse [the salvor's] offer to excavate the alleged vessel." *Id.* at 965.

In *Platoro*, however, a salvage award was granted despite a claim of constructive rejection. Although the *Platoro* court recognized the doctrine of constructive rejection, it found that in the case of a shipwrecked vessel in the submerged lands of the State of Texas, it was not reasonable for the salvors to conclude either that Texas was the owner of the vessel, or that applicable Texas statutes stated an intent to reject salvage services. *Platoro*, 695 F.2d at 902.

In this case, Sea Hunt knew from the outset of this action that JUNO was a Spanish vessel, *see Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29, and possibly of a military character. During the March 11, 1998, hearing before this Court, Sea Hunt expressed to the Court its concern that Spain might claim ownership and reject Sea Hunt's efforts at salvage:

> . . . in the event that the wreck is determined to not have been abandoned, we would like to have our salvage rights protected as of today given the fact that potentially a sovereign

> owner could claim that they are refusing salvage.

See Transcript of Proceedings, March 11, 1998, at 18, lines 14-17 (statement of Mr. Hess). As early as September 24, 1997, more than five months before the filing of the current *in rem* action, Sea Hunt was informed during negotiations with the National Park Service[3] that Spain might claim ownership of the wreck. *See Transcript of Proceedings*, September 15, 1998, at 186, lines 17-21 (testimony of Mr. Benson); *Supplemental Brief for the United States as Amicus Curiae*, attachment 2, May 27, 1999. Sea Hunt's knowledge of the origin of the wreck and of the potential claims of Spain lead this Court to believe that Sea Hunt should have known, and in fact did know, before the filing of this *in rem* action that Spain might refuse any salvage efforts made against JUNO.

In addition, Sea Hunt received express notice from Spain of Spain's intent to refuse salvage of JUNO. Sea Hunt filed a Verified Complaint in Admiralty with this Court on March 11, 1998. In that complaint, Sea Hunt represented to the Court that, "upon information and belief, one of the Defendant Shipwrecked Vessel(s) is that of the JUNO, a Spanish frigate that disappeared in the vicinity of the salvage sites in 1802." *Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29. On March 12, 1998, this Court entered an Order which recognized that Spain might have an interest in making a claim to the wreck of JUNO, and directed Sea Hunt to serve Spain with notice of the *in rem* action against the wreck. On May 18, 1998, this Court

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[3] Because the wreck of the JUNO was located in close proximity to the Assateague Island National Seashore, Sea Hunt entered into negotiations with the National Park Service to discuss salvage operations within the National Seashore's boundaries.

received Spain's answer to the Verified Complaint and Spain's claim of ownership of the wreck.[4] Attached to the claim of ownership was a copy of a Verbal Note from the Spanish embassy in Washington, D.C. to the United States Department of State, in which Spain stated its wish "that the remains of these vessels be treated as maritime graves and that their salvage not be authorized at this time." *Verbal Note*, May 8, 1998, attachment to *Claim of Spain as Owner of Shipwrecks and Contents*, May 18, 1998 (translation). Furthermore, on March 12, 1998, a letter was mailed from the National Park Service to Sea Hunt's president, which notified Sea Hunt that:

> Pursuant to your request, NPS [the National Park Service] contacted the Government of Spain and met with members of the Embassy on November 13, 1997. On February 26, 1998, NPS received a written response from the Government of Spain. The response states that the shipwrecks are sovereign vessels, property of the Government of Spain, and may not be salvaged or disturbed without authorization.

Supplemental Brief for the United States as Amicus Curiae, attachment 2, May 27, 1999.[5] Thus, no later than March 12,

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[4] For various reasons which need not be discussed here, this answer was later found by the Court to be defective. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521 (E.D. Va. 1998). For the purposes of this Order, however, it is only necessary to point out that the Verbal Note from Spain was received by Sea Hunt as of the date of the first defective answer.

[5] Sea Hunt has previously disputed that Spain was contacted by the NPS at Sea Hunt's request. Regardless, as a result of the NPS' contact with Spain, Sea Hunt was explicitly made aware of Spain's refusal of salvage.

1998, Sea Hunt had received an express communication of refusal of salvage services from Spain.

Sea Hunt argues that in this case, where the wreck of JUNO is not in a single location but rather scattered about the ocean floor among several other shipwrecks, it is impossible to determine if a particular artifact belongs to JUNO without first salvaging the artifact. In this regard, Sea Hunt refers the Court to the Ninth Circuit's decision in *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304 (9th Cir. 1980). In *Tidewater*, a dispute arose when several floating logs belonging to Weyerhaeuser were salvaged by Tidewater, a professional salvor, despite Weyerhaeuser's express communication that it did not want Tidewater to salvage its logs. On an issue of first impression for the Ninth Circuit, the court stated the following rule:

> An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any time before the act of salvage. A refusal of assistance . . . is not completed, however, until the salvor, acting as a reasonable person, has determined, or could determine, the ownership of the object of salvage.

Id. at 1307. Not wishing to "discourage salvage as to all floating logs," the court found that:

> As applied to this case, there was no completed communication as to any one floating log until Tidewater, after taking the log aboard, discerned the Weyerhaeuser ownership.

Id. Therefore, since Tidewater had already completed salvage before the communication of refusal was completed, the court affirmed the grant of a salvage award for the floating logs. *Id.*

This Court is not persuaded by *Tidewater*'s reasoning. In *Tidewater*, the court was dealing with floating logs, and not with an inert sunken ship. The plaintiff and defendant in *Tidewater* had to act very promptly, whereas in the case at bar, Sea Hunt had time to contact Spain to determine Spain's wishes before beginning salvage. While the Court recognizes the difficulty of determining the origin of a particular artifact without first bringing it out of the water to examine it, a holding in this case similar to the Ninth Circuit's in *Tidewater* would in effect negate the right to refuse salvage, and would work to "subordinate the rights of the owner to those of the salvor." *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988). To allow an award for artifacts recovered under *Tidewater*'s reasoning would provide an incentive for a salvor to purposefully conduct salvage operations despite the owner's refusal. Furthermore, in a treasure salvage case, it could encourage potential salvors to intentionally remain ignorant of the ownership of a wrecked vessel in order to maintain salvage rights. That is certainly not in harmony with the purposes of salvage law. Therefore, this Court declines to apply the Ninth Circuit's reasoning in *Tidewater*.

It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage. Before conducting any salvage operations pursuant to this Court's Orders, Sea Hunt received an express communication of refusal of salvage from Spain. Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award. The Court realizes that this holding places a substantial burden on Sea Hunt, and places on potential salvors the risk of expending significant time

and resources in salvaging sunken objects for which they will not receive compensation. However, such is the risk inherent in treasure salvage.

For the foregoing reasons, this Court FINDS that Sea Hunt is entitled to no salvage award for salvage services previously conducted on JUNO, and Sea Hunt is DIRECTED to refrain from any further salvage efforts. Sea Hunt is ORDERED to deliver to Spain any artifacts salvaged from JUNO which are currently in Sea Hunt's possession. Should Sea Hunt inadvertently salvage artifacts from JUNO during the course of other salvage operations in the designated salvage areas, such artifacts will be turned over to Spain as owner of JUNO, and no salvage award will be required.

The Clerk is DIRECTED to send a copy of this Opinion and Order to all counsel.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.

United States District Judge

June 25, 1999
Norfolk, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'3" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude
and/or
37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude, 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF STATE

I, Ambassador Mary Beth West, declare and say as follows:

1. I am the Deputy Assistant Secretary of State responsible for oceans affairs and have served in that position since October 1996. My current title is Deputy Assistant Secretary of State for Oceans, Fisheries and Space. I make this declaration on the basis of personal knowledge or information made known to me in the course of my official

duties. This declaration is submitted on behalf of the United States in the above-captioned case.

2. In my capacity as Deputy Assistant Secretary of State for Oceans, Fisheries and Space, I am responsible for United States policy pertaining to international maritime issues, including, but not limited to, the subject of sovereign warships and recognition of title thereto. As an attorney who previously served as an Attorney-Adviser in the Department of State's Office of the Assistant Legal Adviser for Oceans and Fisheries Affairs, I am also familiar with the United States position on the international law of the sea pertaining thereto.

3. In my current position I have been accorded the rank of Ambassador. As an attorney, I handled international legal issues in the State Department's Office of the Legal Adviser for over 12 years. I was also a visiting Professor of Law at the University of New Mexico School of Law for four years.

4. It is the position of the United States that, under customary international law, sovereign warships and their remains which are identifiable as to the flag State of origin are, unless captured prior to their sinking in armed conflict, entitled to recognition and protection as property of the flag State, unless title to the vessel has been expressly abandoned by the flag State of origin.

5. For example, in 1987 the Department of State asserted to the Government of France that title to the warship ALABAMA of the former Confederate States of America, which had been sunk in 1864 by USS KEARSARGE in battle off Cherbourg, France, vested in the United States Government and that the United States had never abandoned title thereto. In 1989 the Government of France abandoned its assertion of title to the ALABAMA, which was based on the fact that the wreck was found on the seabed within the French territorial sea; in 1989 France conceded that title to the ALABAMA was with the United States.

6. In 1997, the Government of France asserted its title to the warship LA BELLE, the flagship of Robert Cavelier de la Salle during his expedition in the Gulf of Mexico, which sank in 1686 and was discovered in July 1995 in Matagorda Bay south of Texas. The Government of France provided documentary evidence which established that the ship was a warship of King Louis XIV of France entrusted to Monsieur Cavelier de la Salle as part of an official mission on behalf of the King of France, title to which the Government of France has not abandoned. The United States Government is prepared to recognize France's title to the shipwreck of LA BELLE as part of an international agreement currently under negotiation with France.

7. In September 1998, the United Kingdom asserted title to an anchor which fell off the British frigate H.M.S. CONFIANCE into Lake Champlain during the Battle of Plattsburgh Bay on September 11, 1814, during the War of 1812, before the warship was captured by the United States. The United Kingdom authorized the United States to recover the anchor and place it on historical display at the Lake Champlain Maritime Museum. The United Kingdom has asserted its title to other British warships sunk in the 18th, 19th and 20th Centuries and later located in United States waters. The United States has recognized those claims.

8. The United States recognizes the claims of Germany to title to Nazi U-boats sunk during World War II and located in United States waters.

9. As the foregoing examples illustrate, it is the policy of the United States Department of State to recognize claims by foreign governments – such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA – to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign.

10. Further, I have examined the provisions of the Treaty of Friendship and General Relations between the United States of America and Spain signed at Madrid July 3, 1902, 33 Stat. 2105, Treaty Series 422, 11 Bevans 628. The records of the Treaty Office of the Department of State show that this treaty entered into force April 14, 1903, and remains in force between Spain and the United States.

11. Article X of this treaty provides:

> In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether *belonging to the State* or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.

(Emphasis added.)

12. Through its Embassy's Diplomatic Note No. 43/98, dated May 8, 1998, Spain has requested the United States to ensure recognition of Spain's ownership of these wrecks and associated artifacts, which have not been abandoned by Spain, to ensure that the remains of these vessels are treated as maritime graves, and to ensure that their salvaging not be authorized at this time.

13. Article X, by the broad scope of its terms ("in cases of shipwreck"), is applicable to ships sunk before as well as after 1902. Because it is not expressly limited to vessels which might sink in the future, under its literal terms, it therefore applies to vessels already sunk in 1902 that otherwise come within the terms of Article X. Its application, however, is necessarily prospective. I understand that this provision is unique in that no other treaty of friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity. It

should be noted that the comparable provision in the 1795 Treaty of Friendship, Limits and Navigation between Spain and the United States, 8 Stat. 138, T.S. 325, 11 Bevans 516, article X, does not expressly mention State ships.

14. It is in the foreign policy interest of the United States to honor the request of the Government of Spain. It is the opinion of the undersigned that Article X requires application of the principles of sovereign ownership ("the same ... protection and the same immunities"), which exist under customary international law, as set forth above. Further, Article X imposes on the United States the responsibility to afford to these Spanish vessels the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location.

15. It is the view of the U.S. Department of State that U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment. Under the Constitution of the United States as interpreted by the Courts of the United States, it cannot be presumed that the U.S. Government has abandoned its sunken warships.

16. The Legislative and Executive Branches of the United States Government have also acted in accordance with the view that title to sunken warships may be abandoned only by an express act of abandonment. Through the Abandoned Shipwreck Act, 43 U.S.C. sec. 2101 *et seq.* (1994) ["ASA"], the United States asserted title to certain *abandoned* shipwrecks (sec. 2105(a)) and transferred said title to the States (sec. 2105(c)). In providing the views of the Department of State to the Chairman of the House Committee on Merchant Marine and Fisheries on S. 858, entitled the "Abandoned Shipwreck Act of 1987", the Assistant Secretary of State for Legislative Affairs wrote "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or

lack of positive assertions of right are insufficient to establish such abandonment." (Letter of J. Edward Fox to the Hon. Walter B. Jones, Feb. 19, 1988, reprinted in House Rep. 100-514, Part 2, 100th Cong., 2d Sess., at 13.) The House Committee on Interior and Insular Affairs agreed in its report No. 100-514, Part I, pp. 3-4, Mar. 14, 1988 ("The Committee notes that the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of right are insufficient to establish such abandonment."). These limitations are included in the National Park Service's Abandoned Shipwreck Act Guidelines, vol. 54, Federal Register, No. 63, April 4, 1989, pp. 13642 *et seq. passim*. In consonance with the foreign policy and treaty responsibilities of the United States as stated above, the term "abandoned" when applied in reference to both foreign and U.S. warships is to be given its customary meaning in both international and domestic law, as requiring an express abandonment. Thus foreign warships which have not been expressly abandoned are outside the purview of the ASA.

17. In light of the foregoing, the United States recognizes:

a. the international law rule that warships and their associated artifacts, whether or not sunken, are entitled to sovereign immunity.

b. that sunken warships are historical artifacts of special importance and entitled to special protections; that many have unique histories making them part of their country's traditions; and that they may be the final resting places of persons who died in the service of their nations.

c. that the practice of nations confirms the well-established rule of international law that title to such vessels is lost only by an express act of abandonment, gift or sale by the sovereign in accordance with relevant principles of international law and the law of the flag State governing

abandonment of government property, or by international agreement or by capture or surrender during battle before sinking.

d. that, absent an express act of abandonment, a coastal State (such as the United States) does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed over which it exercises sovereignty or jurisdiction, and a State of the United States does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed to which the State was given certain rights by the Submerged Lands Act, 43 U.S. Code sec. 1301 *et seq.*, and the Abandoned Shipwreck Act, 43 U.S. Code sec. 2101 *et seq.* (1994), although access to such vessels is subject to coastal State control in accordance with international law.

e. that, absent an express act of abandonment, no person or State may salvage or attempt to salvage sunken warships or their associated artifacts, wherever located, without the express permission of the sovereign flag State, whether or not the vessel is a war grave.

f. that sunken warships containing crew remains are entitled to special respect as graves and must not be disturbed without the explicit permission of the sovereign.

18. Adherence to these principles is of great importance to the United States, which has nearly 3,000 sunken warships located around the globe, some 1,300 in U.S. waters and over 1,500 in foreign and international waters. If the United States does not grant such protection and immunities to U.S. or foreign warships sunk in its own waters, it would expect difficulties in seeking those same protections and immunities for sunken U.S. warships in foreign or international waters. In particular, if the United States does not protect the wrecks of the Spanish warships JUNO and LA GALGA as requested by Spain it could be expected that Spain would not be prepared to protect sunken U.S. warships discovered in

Spanish waters. Further, the Congress of the United States has recognized that it is in the public interest to preserve our national maritime heritage. 16 U.S.C. sec. 5401.

19. A previous opinion of the Deputy Legal Adviser of the Department of State given in 1980 to the same effect, relating to sunken World War II Japanese warships, appears in the DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, pages 999-1006 (Marian Nash Leich ed., Dep't of State Pub. 9610, 1986).

20. A portion of the memorandum attached to that opinion (pages 1003-1004) cites a number of older cases, the oldest of which involved a British frigate sunk in 1781 or 1782 in New York waters, for the proposition that abandonment of title to warships may be express or implied. The memorandum also states:

> The practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time (the premise, for example, in [the case involving this 18th Century British frigate]). Factors such as an increased reluctance to abandon title to U.S. government property, including vessels that have become, in many situations, the final resting place of military personnel, as well as the existence of more sophisticated methods of salvaging vessels and communicating decisions to abandon vessels, have in effect resulted in a demise of the earlier view. In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (*e.g.*, in the World War II era), it should be presumed that title to such vessels remains in the U.S. Title to vessels sunk in the more distant past (such as during

> the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretation of that period.

21. The last sentence of this quotation does not state current U.S. policy and is not consistent with the current practice of the United States and other countries. The procedures for the abandonment of sunken U.S. warships located outside the territory of the United States, set forth in 10 U.S. Code sec. 7305-7308 and 7545 (1994) and implementing regulations 32 C.F.R. parts 172 and 736 (1997), and for other U.S. vessels in 40 U.S. Code sec. 484(i) (1994) and 46 U.S. Code App. sec. 1158 (1994), make no provision for implied abandonment or impose any limitation as to the age of U.S. property. The practice of the United States and other countries since 1980 with regard to "vessels sunk in the more distant past" is now consistent with that related to "warships sunk in the near past", *i.e.*, their abandonment is not to be presumed or implied, but must be express. *Accord* Gerald J. Mangone, UNITED STATES ADMIRALTY LAW 225 (Kluwer, 1997) ("U.S. warships, for example, sunk and untouched for more than a century, will not be considered as abandoned").

22. Neither of the two multilateral international treaties on salvage permit the salvage of sunken warships without the express permission of the flag State. The 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (the Brussels Convention), 37 Stat. 1658, T.S. 576, 1 Bevans, 780, is expressly not applicable to warships, as Article 14 thereof provides "This convention does not apply to ships of war or to Government ships appropriated exclusively to a public service". The 1989 Convention on Salvage, Sen. Treaty Doc. 102-12, Sen. Exec. Rep. 102-1, similarly provides in Article 4, State-owned vessels, that "1. . . . this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to

sovereign immunity under generally recognized principles of international law unless the State decides otherwise." These multilateral treaties are but two of the more than 50 treaties in force that recognize the sovereign immunity of warships. Most of these treaties are listed in ROACH & SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 466-471 n.45-67 (Kluwer 2d ed. 1996).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of December 1998, in Washington, D.C.

/s/ Mary Beth West

Ambassador Mary Beth West
Deputy Assistant Secretary
(Oceans, Fisheries and Space)
United States Department of State

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'33" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude and/or 37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF DEFENSE

Rear Admiral John D. Hutson, Judge Advocate General's Corps, United States Navy, deposes and says under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Judge Advocate General of the Navy, and I also serve as the Department of Defense Representative for Ocean Policy Affairs. I make the statements herein on the basis of personal knowledge or information made known to me in the course of my official duties.

2. In my capacity as Judge Advocate General of the Navy, I am responsible for providing legal and policy advice to the Secretary of the Navy on admiralty, maritime, and international law. As the Department of Defense Representative for Ocean Policy Affairs, I serve as the central point of contact and represent the Department of Defense in international and interagency negotiations for matters involving the law of the sea and related ocean policy.

3. Based on official records, the Naval Historical Center currently estimates that 3,000 U. S. Navy vessels lie submerged around the world. Of these, as a very rough estimate, approximately 1,500 vessels are believed to lie in the territorial seas of foreign nations or in international waters. Many of those vessels were lost in World War II.

4. Additionally, approximately 15,000 Navy aircraft lie submerged around the world. Of these, approximately 5,000 lie in foreign or international waters. The legal issues regarding salvage of these aircraft are substantially the same as those involved in vessels and the following arguments apply to them at least to the degree they do to vessels. Specific reference to aircraft is omitted in the following discussion only due to the limited scope of the instant litigation. The large number of submerged aircraft and the comparative ease with which submerged aircraft can be recovered highlights the importance of a correct resolution of these issues.

5. The protection of sunken or submerged vessels from unauthorized salvage, theft, dismemberment, destruction, or disturbance is of high importance to the Department of Defense. Many such vessels are war graves, or are the final resting places of United States service members. As such, submerged vessels are due the same deference as a national cemetery. Some of the vessels or their equipment or cargo are of continuing monetary value. A few still contain classified information or features relevant to the national

security. Many such vessels are of significant cultural importance, often representing unique repositories of artifacts emblematic or instructive of national or maritime history. Many submerged naval vessels also contain unexploded ordnance, which may pose severe dangers to those visiting them. Further, many submerged vessels also contain lead, oil, asbestos, or other materials, which may pose an environmental hazard if released into the environment through disturbance of the site. Efforts to exploit these sites need to be carefully controlled.

6. United States policy has consistently been that these sunken sovereign vessels remain the property of the United States absent the government's formal, affirmative abandonment, sale or donation of ownership, pursuant to Act of Congress and implementing regulations. *See, e.g., Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd mem.* 698 F.2d 1215 (5th Cir. 1983). This policy has been sanctioned by federal court rulings, and it applies regardless of condition, location, or date of sinking of the vessel. The United States maintains title to such vessels regardless of the circumstances of the sinking, which may include intentional scuttling, sinking after the crew has abandoned ship for lifesaving purposes, or sinking during use as a target. The policy of perpetual ownership facilitates government supervision of these wrecks and serves the United States Government's and the public's interests in preserving the sanctity of service members' graves, preserving historic cultural resources, maintaining the government's fiscal and property interests, and protecting the public against the potential dangers posed by unexploded ordnance and environmental degradation.

7. Consistent with its other interests the Navy's policy generally has been to allow open access to U.S. Navy wreck sites for recreational divers, at the divers' own risk, so long as the site is not disturbed – "Look but don't loot" – and so

long as access does not involve risks to personal safety, military security, or the environment.

8. It is the policy and practice of the United States to allow such vessels to remain where they lie until such time as it is in the government's interest to recover them in their entirety or in part or to exploit them for the sake of historical or archaeological study. Because of limitations at any one time on the availability of funding to conduct exploration and/or salvage to curatorial standards and limitations on technology required to accomplish such operations consistent with the government's and public's long-term interests, it is the U.S. Government's practice to cautiously consider any proposed action with respect to such wrecks. Because of variables such as water depth, proximity to land, the degree to which a submerged craft is embedded in the sea bottom, and the date of the sinking, it is not possible to predict, with any degree of certainty, just how much it would cost the United States to salvage or to demonstrate affirmative control over submerged vessels by physically preventing their disturbance. To permit salvage of such vessels without the government's prior authorization would either put those wrecks and sites in serious danger or compel the government to expend immense sums to effect preemptive recovery or to attempt to enforce affirmative control as the means to deny salvage. For the United States policy to be effective, United States title and control with respect to such wrecks must be of indefinite duration.

9. Because a large number of wrecked United States Government vessels are in foreign or international waters, it is in the United States interest that other sovereign nations recognize the United States perpetual interests in its wrecks. A clear inducement for other nations to do so is the United States and its constituent States reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters. To that end, requests of private individuals or entities for permission

to salvage foreign sovereign vessels sunk, without capture, in United States waters are routinely referred to cognizant foreign state owners. United States failure to recognize such foreign sovereign interests will make it less likely that other nations will recognize the United States interests in its wrecks in their waters.

10. Reciprocal recognition of sovereign rights is emerging as customary international practice. For example, the Department of State negotiated a bilateral agreement with France regarding the remains of the C.S.S. Alabama, a Confederate warship that was sunk off Cherbourg in 1864 by U.S.S. Kearsarge. By that agreement France recognized U.S. title to the wreck and both nations agreed to cooperate in the investigation, protection, and eventual recovery of the wreck. Inherent in such negotiations is the good-faith understanding that, when roles are reversed, the United States will recognize appropriate foreign sovereign claims and will take reasonable measures to protect foreign sovereign property.

11. The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign, non-commercial United States wrecks in foreign waters to be treated.

FURTHER AFFIANT SAYETH NOT.

Executed this 18th day of December 1998, under penalty of perjury pursuant to 29 U.S.C. § 1746.

/s/ John D. Hutson
JOHN D. HUTSON
Rear Admiral
Judge Advocate General's Corps
United States Navy

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

No. 43/98

The Embassy of Spain presents its compliments to the Department of State and, regarding the request presented by the company Sea Hunt Inc. before the Federal Court of the State of Virginia concerning the salvaging of the vessels believed to be Juno and La Galga, has the honor to inform:

1) The vessels Juno and La Galga and their associated artifacts are the property of Spain, who has never acted in a manner that would expressly or tacitly signify their abandonment. The relevant historical documentation will be presented shortly.

2) It is Spain's wish that the remains of these vessels be treated as maritime graves and that their salvaging not be authorized at this time.

3) In accordance with article 10 of the Treaty of Friendship between Spain and the United States signed in 1903, the Embassy of Spain requests that the competent authorities take the necessary steps to ensure the above including those related to the Federal Court of the State of Virginia involved, and grant to these vessels the same assistance, protection and immunities that shipwreck property of the United States would merit.

Her Majesty's Government would be grateful if the Department of State could convey these views to the court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

BRITISH EMBASSY/WASHINGTON (SEAL)

[Dated: July 7, 1999]

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

Num. 60/99

The Embassy of Spain presents its compliments to the Department of State and in relation to the Department of State Verbal Note of today, has the honor to refer to the proceedings concerning the Spanish Navy Frigate "La Galga" in the United States Distric [sic] Court of the Eastern Distric [sic] of Virginia. By previous communications, the Department of State has been informed that H.M. Frigate "La Galga" was a serving vessel of the Spanish Navy engaged on active duty at the time of her sinking as escort to a convoy of vessels en route from Mexico to Spain.

In the above-referenced proceedings, the judge has entered an order of April 27, 1999 stating that H.M. Frigate "La Galga" ceased to be the property of Spain by virtue of the Definitive Treaty of Peace between France, Great Britain and Spain on 10 February 1763 and in particular the provisions of Article XX in which an exchange of certain territory with Great Britain was effected between Spain and Great Britain. The Embassy of Spain desires by this Note to affirm to the Department of State Spain's interpretation and understanding of the Treaty of 1763 and to express its agreement with Note Number 41 of Her Britannic Majesty's Embassy on the same subject.

In view of the above-referenced order, the Embassy of Spain reaffirms its view that Article XX of the 763 [sic] Treaty was not a cession or abandonment of H.M. Frigate "La Galga" or other shipwrecked vessels of Spain. Article XX was also not a cession of shipwrecked vessels or other

state property situated on the seabed, a subject which is not addressed in Article XX. It should also be noted in this connection that Article XX includes specific reservation of continued ownership and rights of removal with respect to Royal effects and other moveable Royal property, such as H.M. Frigate "La Galga". This reservation has no expiration or other time limitation, in contrast to specific time periods designated for carrying out other undertakings of the Treaty. The Embassy of Spain further notes that the principle of sovereignty and non-interference with state vessels was specifically recognized in the 1667 Treaty of Madrid between Spain and Great Britain and was reaffirmed to the fullest extent in Article II of the 1763 Treaty.

The Embassy of Spain takes this opportunity to renew to the Department of State its expression of appreciation for the United States for its assistance and support in recognizing the principles of sovereignty with respect to state vessels and in the protection of the remains of those who died in the service of their country and to renew to the Department of State the assurances of its highest consideration.

Washington, DC, July 8 1999

LEGAL BUREAU
SPANISH DESK
WASHINGTON, D.C.